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# Procedure - Waivability of Jurisdiction Ratione Personae

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is found in the time separating the shooting, which took place on the tracks, from the time of the arrest, which occurred in the station house. In neither of these cases did the court indicate that the element of time separating the two events was a basis for its decision, but this factor might well have influenced the court in finding separate and distinct offenses not arising out of the same circumstances.

One very obvious effect of the present inflationary spiral has been the sharp increase in the proportion of civil cases now going on appeal to the supreme court. In recognition of this the Louisiana State Law Institute, in its *projet* of a new state constitution, has proposed an increase of the supreme court's jurisdictional minimum from \$2000 to \$8000.<sup>12</sup> In providing a badly-needed limitation on the jurisdiction of Louisiana's highest court, and in affording a more even distribution of appeals among the four appellate courts, the result of the *Cavalier* case should prove desirable. Its overruling of the *Newsom* and *Applewhite* cases, however, leaves some rather difficult questions unanswered.<sup>13</sup>

Ronald Lee Davis, Jr.

#### PROCEDURE—WAIVABILITY OF JURISDICTION

##### RATIONE PERSONAE

Plaintiff filed suit in Union Parish against residents of Claiborne Parish, who were properly cited therein. A preliminary

12. *Projet* of Constitution of Louisiana, Louisiana State Law Institute, Art. VI, § 16(3) (1950).

13. Suppose that under the facts of the principal case there had been a month's interval of time between the assault and battery and the defamation, but that there was a direct causal connection between the two offenses. Would the claim for the defamation be deemed to arise "out of the same circumstances" as the claim for damages for the assault and battery, within the contemplation of the constitutional provision? If so, then the rationale of the *Cavalier* case is causal connexity, rather than any test as to the simultaneous or continuous nature of the circumstances upon which the two causes of action are based. Compare *Searcy v. Interurban Transp. Co.*, 179 So. 93 (La. App. 1937).

Until these and similar questions have been answered, it is recommended that under circumstances similar to the principal case, the appeal on both causes of action be prosecuted to the proper court of appeal, which would clearly have jurisdiction, at least as to the physical injury action. Then, even if the intermediate appellate court held the other action to fall within the appellate jurisdiction of the supreme court, the court of appeal could review the physical injury action and then transfer the balance of the case to the supreme court, under La. R.S. (1950) 13:4440. Cf. *State v. J. Foto & Bros.*, 134 La. 153, 63 So. 859 (1913).

default was taken, and upon subsequent motion for confirmation, the district court held that it was without jurisdiction *ratione personae* and dismissed the suit. *Held*, affirmed. Article 162 of the Louisiana Code of Practice<sup>1</sup> expressly provides that the defendant must be sued at his domicile and if suit be brought elsewhere the defendant is under no compulsion to remind the court of its lack of jurisdiction. *Automobile Insurance Company of Hartford v. Thornton*, 56 So. 2d 308 (La. App. 1952).

The most obvious effect of the instant decision is to render nugatory the clear intendment of Article 93 of the Code of Practice,<sup>2</sup> providing that an exception to the jurisdiction of the court based on domicile must be tendered in limine. The court stated, "In order to sustain plaintiff's contention it will be necessary to hold that the provisions of Articles 93 and 333<sup>3</sup> of the Code of Practice . . . supersede the clear provision of Article 162."<sup>4</sup> It is submitted that there is nothing in these articles which is at all inconsistent.<sup>5</sup> It is, of course, generally true that a defendant has the right to be sued at his domicile. However, it is also a fact that this right is personal and if the defendant fails to exercise it, no one suffers but himself.<sup>6</sup> A long line of cases apply Article 93 and hence are contrary to the present holding.<sup>7</sup>

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1. "It is a general rule in civil matters that one must be sued before his own judge, that is to say, before the judge having jurisdiction over the place where he has his domicil or residence, and shall not be permitted to elect any other domicil or residence for the purpose of being sued, but this rule is subject to those exceptions expressly provided for by law." Art. 162, La. Code of Practice of 1870.

2. "If one be cited before a judge whose jurisdiction does not extend to the place of his domicil, or of his usual residence, but who is competent to decide the cause brought before him, and he plead to the merit, instead of declining the jurisdiction, the judgment given shall be valid, except the defendant be a minor." Art. 93, La. Code of Practice of 1870. While Article 93 does not deal specifically with a judgment by default, it is submitted that no distinction should be made, in view of the language of 333(2), La. Code of Practice of 1870, quoted *infra* note 3.

3. "It is a rule which governs in all cases of exceptions, except in such as relate to the absolute incompetency of the judge before whom the suit is brought, that they must be pleaded specially in limine litis, before issue joined, otherwise they shall not be admitted.

"Hereafter no dilatory exceptions shall be allowed in any case after a judgment by default has been taken; and in every case they must be pleaded in limine litis at one and the same time, otherwise they shall not be admitted; nor shall such exceptions hereafter be allowed in any answer in any cause.

"No dilatory exception shall be allowed in any pending case unless the same shall be filed within ten days from the time this Act becomes effective." Art. 333, La. Code of Practice of 1870.

4. 56 So. 2d 308, 309 (La. App. 1952).

5. *Marqueze v. LeBlanc*, 29 La. Ann. 194 (1877) and *Phipps v. Snodgrass*, 31 La. Ann. 88 (1879) specifically state that there is no conflict.

6. See Comment, 12 LOUISIANA LAW REVIEW 210, 212 (1952).

7. *McAlpine v. Jones*, 13 La. Ann. 409 (1858); *Tegarden v. Powell*, 15 La.

It is possible that the background for the *Thornton* decision is to be found in *Mitcham v. Mitcham*<sup>8</sup> and *Bercegeay v. Teche-land Oil Company*.<sup>9</sup> In those cases the supreme court held that the fact that mandatory language is employed in Article 165 of the Code of Practice<sup>10</sup> renders those rules non-waivable. While the writer seriously questions the soundness of those decisions,<sup>11</sup> even if they be accepted the instant holding is not a necessary sequel. In the *Mitcham* and *Bercegeay* cases the rationale was that the mandatory provisions of Article 165 referred to jurisdiction *ratione materiae*, the lack of which can be pleaded at any time.<sup>12</sup> It is apparent that the court of appeal did not follow this line of reasoning in the case noted, since it referred only to jurisdiction *ratione personae*. The court relied on the clause of Article 162 which declares that the defendant is expressly prohibited from choosing any place other than his domicile for the purpose of being sued. Several cases<sup>13</sup> have held, however, that this language means no more than that parties are prohibited from confecting an agreement designating a place for the institution of a *prospective* suit. It has no relation at all to a suit actually pending and hence is not in disaccord with Article 93.

The *Thornton* holding also raises the insoluble riddle of which court will have jurisdiction in the face of two mandatory provisions designating different places for the cause to be tried.<sup>14</sup> The logic of the case would seemingly preclude either court from hearing the cause,<sup>15</sup> yet it is obvious that the draftsmen of the code intended no such anomaly. The writer asserts that "must" as used in Article 162 means only that suit must be brought at the defendant's domicile if the defendant insists upon it, that is,

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Ann. 184 (1860); *Marqueze v. LeBlanc*, 29 La. Ann. 194 (1877); *Phipps v. Snodgrass*, 31 La. Ann. 88 (1879); *Goodrich v. Hunton*, 31 La. Ann. 582 (1879); *Tupery v. Edmonson*, 32 La. Ann. 1146 (1880); *Stevenson v. Whitney*, 33 La. Ann. 655 (1881); *Stackhouse v. Zuntz*, 36 La. Ann. 529 (1884); *Lyons v. Kelly*, 40 La. Ann. 498, 4 So. 480 (1888); *Atkins v. Scarborough*, 52 La. Ann. 800, 27 So. 134 (1899); *Bernstein v. Dalton Clark Stave Co.*, 122 La. 412, 47 So. 753 (1908); *Zeller v. Louisiana Cypress Lbr. Co.*, 9 La. App. 609, 121 So. 670 (1929).

8. 186 La. 641, 173 So. 132 (1937).

9. 209 La. 33, 24 So. 2d 242 (1945), noted in 7 LOUISIANA LAW REVIEW 437 (1947).

10. Providing a number of exceptions to the general rule of Article 162.

11. See Comment, 12 LOUISIANA LAW REVIEW 210, 215 et seq. (1952).

12. Art. 92, La. Code of Practice of 1870.

13. *Marqueze v. LeBlanc*, 29 La. Ann. 194 (1877); *Phipps v. Snodgrass*, 31 La. Ann. 88 (1879). See also concurring opinion in *School Board v. Weber*, 30 La. Ann. 593 (1878).

14. For example, two of the "must" provisions of Article 165.

15. See *McMahon*, Louisiana Practice 13, § 5, n. 15.1 (Supp. 1949) and 7 LOUISIANA LAW REVIEW 262, 263 (1947); Note, 7 LOUISIANA LAW REVIEW 437 (1947).

by raising timely objection to a suit brought in another parish.<sup>16</sup> In cases of conflicting statutory enactments, prior decisions allowed the plaintiff to choose the tribunal.<sup>17</sup>

Apparently the only jurisprudential authority relied on by the court is *Franek v. Turner*.<sup>18</sup> Pretermitted a discussion of the merits of that decision,<sup>19</sup> suffice it to say that the majority opinion itself would not seem to bear out the reliance put upon it. Chief Justice O'Niell, speaking for the court, expressly recognized the rule which the instant case discards: "As a general rule, a defendant who is sued in a court that has not jurisdiction over him personally becomes liable to have a personal judgment rendered against him if, being cited personally, he does not take exception in limine litis to the jurisdiction of the court. *But that rule is not applicable to this case*, because the court in which [defendant] was sued did have jurisdiction over the case, to the extent of the value of the property that was provisionally seized."<sup>20</sup> (Italics supplied.) There is no attempt by the court to place the *Thornton* case into the exception which *Franek v. Turner* represents.

One further statement of the court deserves comment: "To our way of thinking there is no more reason for requiring a plea to the jurisdiction by a non-resident of a parish who is personally served within such parish than there would be for requiring such a plea by a non-resident of the State, served without the State."<sup>21</sup>

When used in the interstate sense, jurisdiction over the person does not correspond, in the writer's opinion, with jurisdiction *ratione personae*. The latter, it is submitted, is the equivalent to the common law term venue, and means only "the place where the suit is to be brought." The former, on the other hand, draws in a constitutional question, namely, whether the defendant has been properly brought before the court.<sup>22</sup> In this regard, the Supreme Court of the United States announced, in

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16. See Comment, 12 LOUISIANA LAW REVIEW 210, 215 (1952).

17. *Williams' Heirs v. Zengel*, 117 La. 599, 42 So. 153 (1906); *Rathborne Lumber Co. v. Cooper*, 164 La. 502, 114 So. 112 (1927); *Esmele v. Violet Trapping Co.*, 187 La. 728, 175 So. 471 (1937). In these cases, however, both provisions were not "mandatory."

18. 164 La. 532, 114 So. 148 (1927).

19. It is understood that the rule of *Franek v. Turner* will be overturned in the revision of the Code of Practice.

20. 164 La. 532, 537, 114 So. 148, 149.

21. 56 So. 2d 308, 311 (La. App. 1952).

22. See Comment, 12 LOUISIANA LAW REVIEW 210, 211 et seq. (1952).

*Pennoyer v. Neff*,<sup>23</sup> the doctrine that, if personal service cannot be made upon the defendant within the state, his property must be attached prior to the institution of suit. This procedure creates jurisdiction only up to the value of the property, hence the action is one in rem. It would seem, therefore, that the analogy the court attempts to draw should fail. For the same reason, the court's statement that the interpretation placed on Article 163, providing for jurisdiction in rem, should be indicative of the interpretation to be given Article 162,<sup>24</sup> would not appear to be valid. Again, the reasoning would seem to be open to the criticism that one article applies to jurisdiction in rem, the other to jurisdiction in personam.

It is hoped that the court will revert to the position taken by the prior jurisprudence on this question, and by the late Judge Taliaferro, dissenting in the present decision.

Robert Roberts III

#### SALES—RESCISSION FOR MISREPRESENTATION—

##### FRAUD PRACTICED BY VENDOR

Plaintiff sued to rescind an act of sale of certain real property, alleging that the defendants misrepresented the amount of legally collectible rents which they were receiving from said property. The district court sustained defendants' exception of no cause or no right of action. The supreme court on the first hearing affirmed, but on rehearing reversed itself and set aside its former decree. *Held*, allegations that plaintiff was induced to purchase an apartment house by vendors' misrepresentations as to legally collectible rentals stated a cause of action against vendors for rescission attributable to error of fact relating to the principal cause, and error of fact induced by fraud. *Overby v. Beach*, 55 So. 2d 873 (La. 1951).<sup>1</sup>

The question of the effect of fraud or error upon a contract is one of ancient origin.<sup>2</sup> The general doctrine of early Roman

23. 95 U.S. 714 (1878).

24. 56 So. 2d 308, 310 (La. App. 1952).

1. A case of similar nature is *Kackley v. Webber*, 310 Ky. 285, 220 S.W. 2d 587 (1949). Cf. *Glichester Properties Ltd. v. Gomm*, 1 All E.R. 493 (1948); *Kabatchniek v. Hanover-Elm Bldg. Corp.*, 103 N.E. 2d 692 (Mass. 1952).

2. *Oeuvres de Pothier, Annotées et Mises en Corrélation avec le Code Civil et la Législation, Traite du contrat de vente*, nos 233-238, 241 (1861).